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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE JAMAAL McGIRT, Defendant and Appellant.	E061614 (Super.Ct.No. FVI1304039) OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris, Dwight W. Moore and Raymond L. Haight III, Judges. Affirmed with directions.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Lawrence Jamaal McGirt, guilty of robbery (Pen. Code, § 211)[1] and burglary (§ 459). The trial court found true the allegations that defendant suffered (1) two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); (2) two prior serious felonies (§ 667, subd. (a)); and (3) four prior convictions for which he served prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for a determinate term of 14 years and a consecutive indeterminate term of 25 years to life.[2]

Defendant raises three issues on appeal. First, defendant contends he was deprived of his right to a fair and impartial trial judge. Second, in the alternative, to the extent defendant's counsel trial waived the judicial impartiality issue and/or invited the error, defendant asserts his trial counsel was ineffective. Third, defendant contends the trial court erred by imposing prison terms for two of the prison priors (§ 667.5, subd. (b)) because those prior convictions were also the basis for prior serious felony (§ 667, subd. (a)) prison terms. The People concede defendant's third contention is correct. We affirm the judgment with directions.

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[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

[2] The reporter's transcript reflects the trial court imposed a 14-year determinate prison term and a 25-years-to-life indeterminate term. The clerk's minute order and the abstracts of judgment reflect the trial court imposed two separate indeterminate terms: a 14-year indeterminate term followed by a 25-years-to-life indeterminate term. Because a 14-year term has a fixed limit, it is determinate. Therefore, we conclude the clerk's transcript is incorrect and the reporter's transcript is accurate—the 14-year sentence is determinate, not indeterminate. We will direct the trial court to issue amended abstracts of judgment.

FACTUAL AND PROCEDURAL HISTORY

A. DEFENDANT'S OFFENSES

On December 11, 2013, defendant entered a Circle K store in Adelanto. Defendant placed merchandise from the store into his backpack. A customer service clerk, who had been watching defendant, approached defendant and said, "[T]his isn't gonna happen." Defendant responded, "Yes, it [is]." Defendant then said he had "a big ass gun." The customer service clerk returned to the cash register area and called law enforcement. Defendant exited the store without paying for the items that he had placed in his backpack.

Defendant entered a green Astro van. A San Bernardino County Sheriff's Deputy was approximately two blocks away from the store when dispatch notified the deputy of the theft at the Circle K. The Deputy saw the green Astro van traveling westbound while the deputy was traveling eastbound, toward the Circle K. The deputy made a U-turn and stopped the van. Defendant was inside the van. Merchandise from the Circle K was inside defendant's backpack.

B. PROCEDURAL HISTORY

The Honorable Debra Harris presided over defendant's jury trial. Opening statements in the jury trial were given on May 20, 2014. The jury returned its verdicts the following day, May 21. A bench trial, concerning the allegations of defendant suffering prior convictions, was scheduled for May 30. On May 30, the trial court examined exhibits related to defendant's prior convictions.

Upon examining exhibit No. 15, a plea form from 1999, Judge Harris recognized her handwriting on the form. Judge Harris asked if defendant recognized her. Defendant said he did not recognize her from a prior case. Judge Harris asked if defendant recalled her representing him when she was an attorney. Defendant said he did not recall Judge Harris serving as his attorney.

Judge Harris said, "So I have a conflict on this case. In other words, because I signed this plea agreement, then I—I shouldn't have anything to do with the findings. Had I known about this, you know, we could have addressed it earlier. [¶] So you didn't recognize me, and I didn't recognize you. It could have very well been I just filled out the plea form and didn't have any interaction with you. I don't know. [¶] At this point what we're going to have to do is have you brought back on Monday. I'll have the supervising judge in this department, Judge Haight, decide how he's going to proceed on the issue regarding the—the trial on your priors."

The 1999 plea form at issue, for San Bernardino County case No. FVI09367, concerned a case in which defendant pled guilty to second degree robbery (§ 211) and false imprisonment by violence (§ 236). Although Judge Harris said she signed the form, the signatures on the plea form reflect the names Linda C. Forrest and Lisa A. Berg.

On June 2, 2014, defendant filed a motion for new trial. (Pen. Code, § 1181, subd. (8) [new evidence]; Code Civ. Proc., § 170.1 [judicial disqualification].) In the motion, defendant explained that Judge Harris had recognized her handwriting on a plea form in defendant's 1999 case. Defendant wrote, "The plea form was signed by Linda

C. Forrest and Lisa A. Berg. However, Judge Harris noted that in her former employment as a deputy public defender she was assigned as a 'work partner' to Deputy Public Defender Linda C. Forrest and supervised a law clerk named Lisa Berg." Defendant asserted he was entitled to a new jury trial because he "has a right to be sentenced by the same judge who presided over the jury trial. Yet, the judge who presided over his trial is unavailable to continue sitting or acting in this matter due to disqualification by prior representation."

The prosecutor opposed defendant's motion. First, the prosecutor asserted the basis for defendant's new trial motion, section 1181, subdivision (8), which concerns newly discovered evidence, was inapplicable. The prosecutor contended Judge Harris's discovery of her involvement in defendant's 1999 case was not evidence, because evidence would need to be something that related to guilt or innocence in the current case. Second, the prosecutor argued that, even if Judge Harris's discovery were evidence, defendant failed to show a different result was probable if the case were retried.

Third, the prosecutor cited Code of Civil Procedure section 170.3, subdivision (b)(4), which provides, "If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge." The prosecutor asserted this law supported the upholding of the

jury verdict since defendant failed to establish bias on the part of Judge Harris. Fourth, the prosecutor contended Judge Harris was unavailable due to the conflict, so it was proper to have a different judge conduct the sentencing hearing. (See *People v. Collins* (2010) 49 Cal.4th 175, 257-258 [when a trial judge becomes unavailable, a pending motion may be heard by any other judge of the same court].)

The Honorable Raymond L. Haight III, presided over the hearing on defendant's motion for new trial. Judge Haight took judicial notice of the reporter's transcript from the hearing in which Judge Harris discovered the conflict with defendant. Judge Haight received into evidence defendant's 1999 plea form, containing Judge Harris's handwriting, as exhibit No. 1. Defendant did not have further evidence to offer the court. The prosecutor said she accessed the court minutes for defendant's 1999 case, and Judge Harris had only made one appearance in the case. The appearance was not on the date of the guilty plea; rather, the appearance was made at the first hearing after defendant's arraignment for the purpose of continuing the case. Judge Haight received the case printout, including the minute orders, from defendant's 1999 case, as exhibit No. 2.

Defendant argued that he "has a right to be sentenced by the same judge that previously heard the underlying facts" of the case. Defendant asserted he would suffer harm if he were sentenced by a judge who had read the trial transcript, rather than having presided over the jury trial. Defendant asserted that Judge Harris engaged in meaningful representation of defendant in 1999 because, in order to have the

arraignment continued, Judge Harris would have needed to review the case file and discovery, and advised defendant regarding his plea.

The prosecutor argued that the minute orders did not reflect "any sort of substantial advisement of the defendant" on the date wherein Judge Harris appeared as defendant's attorney; rather, the advisements were provided on the date of defendant's change of plea, when Linda Forrest and Lisa Berg appeared on defendant's behalf. The prosecutor contended Judge Harris may have filled out the plea form, but the advisements were given to defendant by the attorneys who signed the plea form, i.e. Forrest and Berg. The prosecutor noted: (1) Judge Harris's name was not on the plea form; (2) two other attorneys' names were on the plea form; (3) Judge Harris and defendant did not recognize one another; and (4) Judge Harris said she may have only completed the plea form and never interacted with defendant.

The prosecutor argued that it was preferable to have the same judge preside over a trial and sentence a defendant, but that if the judge became unavailable prior to sentencing, then a new trial was not necessarily warranted. The prosecutor contended defendant had not established that the rulings made by Judge Harris were prejudicial, such that Judge Harris's rulings and/or the jury verdicts should be set aside.

Judge Haight found there was no evidence of Judge Harris having provided meaningful representation to defendant in the 1999 case. Judge Haight explained that it was "just pure speculation" that Judge Harris provided meaningful representation to defendant. Judge Haight noted no one—not Judge Harris or defendant—realized she participated in the 1999 case until after the jury verdicts had been rendered. As a result,

Judge Haight concluded there was not a conflict of interest requiring a new trial. Judge Haight said, "There's just no evidence that any ruling or any decision made in that case could have been a result of [a] conflict of interest that nobody was aware of at the time." Judge Haight denied defendant's motion.

Judge Haight concluded Judge Harris had recused herself for the trial on defendant's alleged prior convictions, so he reassigned the bench trial to the Honorable Dwight W. Moore. Judge Haight remarked that defendant could have Judge Harris sentence defendant; however, Judge Haight said, "She may very well recuse herself on the sentencing too. We haven't gone that far."

Judge Moore conducted the bench trial concerning the allegations of defendant's prior convictions. Judge Moore found all the prior conviction allegations to be true. Judge Moore then said, "The defendant is entitled to be sentenced by the judge who heard his trial. And in the rather unique circumstances we have here there are two such judges, Judge Harris and myself. [¶] I believe the defendant has a choice as to whether he would prefer the sentencing to be done in this department or if I should return the matter to Judge Harris for further proceedings in her department. [¶] Counsel, your call."

Defense counsel responded, "Yes, your Honor. I've spoken with [defendant], advised him concerning our last hearing that was on the record on June 17th, and it's [defendant's] request to be sentenced in your court, Your Honor." Defendant was sentenced by Judge Moore.

DISCUSSION

A. JUDICIAL BIAS

Defendant contends Judge Haight erred in denying defendant's motion for a new trial. Defendant contends his motion should have been granted because, due to Judge Harris's conflict, he was deprived of his right to a fair and impartial judge during the jury trial.

Generally, a trial court's ruling on a motion for new trial is reviewed under the abuse of discretion standard. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) However, where a new trial motion alleges grounds that implicate a defendant's constitutional fair trial rights, some courts have stressed the need for independent review of the trial court's denial of the motion. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262.) Defendant asserts the independent standard of review should be applied in the instant case. Accordingly, we apply the independent standard of review because (1) it is the standard defendant applies, and (2) defendant contends he was deprived of his constitutional right to a fair trial.

Under California's statutory scheme, an appearance of judicial bias is a sufficient ground for judicial disqualification. (*People v. Freeman* (2010) 47 Cal.4th 993, 1001.) However, in the instant case, defendant is relying on the federal standard concerning judicial disqualification. Under federal case law, judicial disqualification requires a probability of bias. Specifically, federal law requires that "even if actual bias is not demonstrated, the probability of bias on the part of a judge [must be] so great as to

become '"constitutionally intolerable."' [Citation.] The standard is an objective one." (*Ibid.*)

In regard to the basis for disqualification, defendant relies upon Code of Civil Procedure section 170.1, subdivision (a)(2)(A), which requires a judge be disqualified if she "served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding."

A judge will not be deemed to have served as a lawyer in a proceeding if, when the judge was a lawyer, his or her interaction with the defendant was perfunctory. For example, a judge will not be deemed to have served as a lawyer in a proceeding where a prosecutor is serving as a judge pro tem, and in his or her role as a prosecutor had previously made an appearance when the defendant's sentence to state prison became effective following the appellate affirmance of defendant's sentence/conviction. Because the judge pro tem did not prosecute the prior case to conviction nor participate in the appeal, but "was simply in the courtroom to take care of the many matters calendared on that date" and knew nothing about the prior case, there was no basis for judicial disqualification. (*People v. Bryan* (1970) 3 Cal.App.3d 327, 342.)

Defendant's 1999 plea form is signed by Linda C. Forrest and Lisa A. Berg. The signatures reflect it was Forrest and Berg who "personally read and explained the contents of the [plea] declaration to the defendant" and who "personally observed the defendant sign said declaration." The minute order from the 1999 plea hearing lists

Berg as the appearing deputy public defender. Judge Harris said she did not recognize defendant from the 1999 case. Defendant said he did not recognize Judge Harris from a prior case. Forrest was Judge Harris's former "'work partner,'" and Judge Harris supervised Berg, who was a law clerk. Judge Harris explained that it was "very" possible that she only filled out the plea form and "didn't have any interaction with [defendant]."

The evidence reflecting Judge Harris was involved in defendant's 1999 case is (1) her admission that she recognized her handwriting on the 1999 plea form; (2) the fact that she used to work with Forrest and Berg; and (3) the minute order reflecting she requested a continuance of defendant's 1999 case at the first hearing following defendant's arraignment. None of this evidence reflects a knowledgeable or meaningful involvement in defendant's 1999 case. We can only speculate as to what information Judge Harris may have gathered in order to (1) request the continuance, and (2) complete the plea form.

The party bringing the motion for new trial bears the burden of proof. (*People v. Dennis* (1986) 177 Cal.App.3d 863, 872.) Defendant has not proven to what extent Judge Harris was involved in defendant's 1999 case. He has only shown that she wrote on his plea form and made a procedural appearance—nothing of a substantive nature has been established. Since we would be required to speculate about the substantive nature of Judge Harris's involvement in defendant's 1999 case, we conclude the trial court did not err by denying defendant's motion for a new trial. (See *People v. Gray* (2005) 37 Cal.4th 168, 230 [speculation will not support reversal of a judgment].)

Defendant asserts the evidence reflects Judge Harris was his lawyer in the 1999 case, as evinced by Judge Harris's statement that she signed the plea form. Defendant contends that, based upon this statement, one need not speculate about the substance of Judge Harris's involvement in defendant's 1999 case because it is reasonable to infer from this statement that Judge Harris signed the plea form using other people's names, i.e., Linda Forrest and Lisa Berg. Because Judge Harris signed the plea form, that means she was the person that advised defendant of his rights.

We disagree with the assertion that it is reasonable infer Judge Harris signed two other people's names to a plea form. When Judge Harris spoke about the plea form, she said she recognized her handwriting on the 1999 plea form. She asked defendant if he recognized her, and then said, "In other words, because I signed this plea agreement, then I—I shouldn't have anything to do with the findings." As Judge Harris continued speaking, she said, "So you didn't recognize me, and I didn't recognize you. It could have very well been I just filled out the plea form and didn't have any interaction with you. I don't know."

The reasonable inference to draw from Judge Harris's comments is that she misspoke when she said she signed the plea form. It is logical to infer that Judge Harris meant to say she filled out the plea form. This inference is reasonable because (1) Judge Harris's signature is not on the plea form, which indicates she did not sign the form; (2) Forrest's and Berg's signatures are on the plea form, which indicates someone other than Judge Harris signed the form; (3) defendant did not recognize Judge Harris, which indicates she was not the person who advised him of his rights, and thus she did

not sign the form; and (4) Judge Harris did not recognize defendant, which further indicates she was not the person who advised him of his rights, and thus would not have signed the form. Accordingly, we conclude it is not reasonable to infer that Judge Harris signed the 1999 plea form.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that, to the extent his trial counsel forfeited the foregoing contention concerning Judge Harris signing the plea form or invited the error, his trial counsel provided ineffective assistance. We have addressed the merits of the signature issue *ante*. We did not find the issue to be forfeited or otherwise procedurally barred. Accordingly, we conclude the ineffective assistance of counsel issue is moot because we can provide no relief on the issue. (See *People v. Travis* (2006) 139 Cal.App.4th 1271, 1280 [abstract or academic questions, wherein no relief can be provided, are moot].)

C. PRISON PRIOR SENTENCES

1. *PROCEDURAL HISTORY*

Defendant suffered (1) a December 2007 burglary (§ 459) conviction in San Bernardino County case No. FVI702636; and (2) a February 1999 robbery (§ 211) conviction in San Bernardino case No. FVI09367. The prosecutor alleged the burglary and robbery convictions were both prison priors (§ 667.5, subd. (b)) and prior serious felonies (§ 667, subd. (a)). As to the 2007 burglary conviction, the trial court imposed a one-year prison term for the conviction being a prison prior (§ 667.5, subd. (b)) and a five-year prison term for the conviction being a serious felony (§ 667, subd. (a)). The

trial court imposed one-year (§ 667.5, subd. (b)) and five-year terms (§ 667, subd. (a)) for the 1999 robbery conviction as well.

2. *ANALYSIS*

Defendant contends the trial court erred by using the 1999 robbery and 2007 burglary convictions to impose the one-year prison terms (§ 667.5, subd. (b)) because the convictions may be used to impose only the greater prior offense prison term. The People concede defendant is correct.

"[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.)

The trial court erred by imposing one-year prison terms (§ 667.5, subd. (b)) and five-year prison terms (§ 667, subd. (a)) for the same prior convictions because only the greater (five-year term) may be applied—not both. Accordingly, we will strike the one-year prison terms for two of the prison priors (§ 667.5, subd. (b)).

DISPOSITION

The one-year prison term (§ 667.5, subd. (b)) for "prior 1," defendant's December 2007 burglary conviction in San Bernardino County case No. FVI02636, is stricken. The one-year prison term (§ 667.5, subd. (b)) for "prior 4," defendant's February 1999 robbery conviction in San Bernardino County case No. FVI09367, is stricken. Defendant's total determinate prison sentence is 12 years. The trial court is directed to issue an amended determinate sentence abstract of judgment and an amended

indeterminate sentence abstract of judgment.[3] The trial court is further directed to transmit the amended abstracts of judgment to the appropriate agency or agencies. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.

[3] The indeterminate sentence abstract of judgment must be amended because it includes the following handwritten note: "Sentenced to State Prison for a total indeterminate sentence of 25 years to life following 14 years indeterminate with to [*sic*] possibility of parole." As explained *ante*, the 14-year sentence should be determinate, not indeterminate. Now it will need to be changed to a 12-year determinate sentence. The indeterminate abstract should also reflect the trial court granted defendant the possibility of parole.